Reply Brief for Citizen Defendants

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In the Supreme Court of the United States.

THE UNITED STATES, Appellant, vs. LEE YEN TAI, Appellee.	No. 503.
CHIN BAK KAN, Appellant, vs. THE UNITED STATES.	No. 525.
CHIN YING, Appellant, vs. THE UNITED STATES.	No. 526.

REPLY BRIEF FOR CHINESE DEFENDANTS.

I.

As to the Facts.

We desire earnestly to object to the attempt by the Government to inject alleged facts into these cases, not in evidence. In the Chin Bak Kan case, the Gov-

er nment,—not the defendant—offered in evidence, the registration certificate issued to the witness for the Chinese defendant, and it was received in evidence (p. 5) and is summarized in the Record (p. 5). It contains no statement as to date of arrival of said witness in the United States, nor length of residence here. The Government did not offer in evidence the application papers from the files of the office of the Collector of Internal Revenue, upon which this certificate was supposed to have been issued, and laid no foundation for the introduction of such alleged impeaching evidence, by calling it to the attention of the witness, or even asking him or any one else to identify his signature thereon. The date of the arrival of the uncle therein specified,—for which it was offered, relates to purely collateral, matter, the date of the uncle's arrival in the United States not going to the issues herein. The alleged application paper for the issuance of the certificate was produced by the Government, but marked "for identification" only (Record, p. 10), and was not introduced in evidence, and is not in the Record. It requires no argument to show that a paper received "for identification" only, is not received in evidence, and this very record preserves the distinction, for the certificate which was received in evidence, was properly marked as an exhibit, not for identification (p. 5). The statement in the Government's brief (pp 3-4) that there is a conflict between the statements made by this witness himself as to the date of his arrival in the United States is thus without support in the evidence, as also all the arguments based upon it. In fact, the Government did not even offer this application paper in evidence.

Nor is the statement in the Government Brief (p 3)

correct, that the uncle of this defendant testified that the defendant was born in the United States in the *first* year after arrival of the parties, which would make him 25 years old, accepting the uncle's statement on the trial of arrival in the United States 25 years ago, while elsewhere in his evidence he says the defendant was born 22 years ago. The latter evidence as to birth in the United States 22 years ago does appear, and in fact twice in the record in accord with American and Chinese dates (pp. 4, 6). The Government has misconstrued the uncle's evidence (p. 4). "I knew him (defendant) for the first seven years I was there in San Francisco" into a declaration that the defendant was known to the witness the first year the witness arrived in San Francisco. What the witness means and says—and this accords with all the rest of his evidence, is that "I knew him for the first (time) seven years (while) I was there in San Francisco"; the witness obviously distinguished between this and the other periods of his acquaintance with defendant, when he saw him in China. He had repeatedly testified that the boy was not born till 22 years ago (before 1901), and therefore, three years after the witness arrived in the United States, and was 22, not 25. As the witness and defendant's parents resided ten years in California, this three-year interval was deducted from ten to make seven years. But, even if the date mentioned in the application paper of the uncle—not called to his attention and not shown to have been knowingly given by him,—of his arrival in the United States be correct, and he and his sister and brother-in-law came here in July, 1879, and not in 1876, it does not contradict the claim that the defendant was born that year in the

United States, and was 22 in 1901. This application shows, however, clearly where the Government witness obtained his information from, as to the date and steamer of arrival of the defendant's witness in the United States. Instead of remembering these precise facts relative to a man theretofore a stranger to him, occurring over twenty years ago, this voluntary Government witness, otherwise discredited also, as already pointed out, was obviously "coached" by the Chinese Inspector with the aid of this application paper.

2nd: Apart from the fact, however, that the application paper was not sufficiently identified, related to collateral matter which cannot be contradicted and that no foundation for its use as impeaching evidence was laid, even the non-introduction in evidence of this application paper is explained by the rulings of Judge COXE, made about this very time, that such application papers are inadmissible, which ruling was binding on the Commissioner. The circumstances and regulations governing the making of these applications for registration, and prescribing their form, are set forth in the Treasury Department's Regulations, dated November 25th, 1893 (Synopsis Treasury Decisions, No. 15542½). Judge COXE properly construed these, as not constituting admissions knowingly and intelligently made by the applicants. The application for registration is required to be in the shape of an affidavit by applicant in the English language, to be sworn to by him before the Deputy Collector. The circumstances quite invariably show that the applicants do not understand or read English, nor can the Court presume that the Deputy Collector is a master of Chinese; yet regula-

tions required the applicant to sign these English papers, though ignorant of their contents. No provision for the use of interpreters was made, but, on the contrary, the oath was required to be administered by the Deputy Collector. No method of communicating the contents of the papers, or verifying the same, was devised, but a mere formal document bearing a meaningless signature was thus coerced. The Note appended to the certificate indicates this more fully; it is as follows:

> "NOTE. If the applicant can sign his name in English it is preferred that he should do so. If he cannot sign in English let him sign in Chinese characters, the deputy collector in that case writing the English equivalent underneath the signature. If the applicant cannot write his name at all, let him make his mark in the usual form."

The record in this very case shows that this witness was not a master of English, and had to testify through an interpreter (p. 3). Thus it will be seen that the Government is seeking now to introduce in evidence, papers not offered at all below, if for no other reason than because the ruling of Judge COXE that they are inadmissible, was acquiesced in by the Government without objection or exception. Moreover, not being introduced in evidence nor called to the attention of the witness, he had no occasion to explain the alleged discrepancy.

3rd: Moreover, the suggestion in the CHIN YING case in the Government Brief (p. 6) that Chin Ying "was in fact a laborer and laundryman in Mott Street, New York," is unjustified by anything in the evidence. In fact, all the learned Assistant Attorney General

ventured to assert as to this, is that " the Government officers were well assured " of such facts, not that there is any evidence accordingly. The statement is also erroneous (Gov. Brief p. 6) that the uncle " became alarmed when the Mott Street address was brought out." Reference is prayed, as negativing this, to the Transcript of Record. As to the suggestion that this witness would not positively deny that Chin Ying had lived in Mott Street, or been a member of a mercantile firm there, but merely stated he did not know, and did not know where he had been in 1895 or 1898, although he had previously testified that Chin Ying had been in China since he was ten (Brief, p. 6) the fact is that the witness' attention on his cross-examination doubtless was directed to the fact that he had testified to matters partly beyond his personal knowledge, since he could not know of his own knowledge where Chin Ying was, when the witness was elsewhere, and on this cross-examination thereafter, possibly testified more guardedly as to matters as to which he disclaimed personal knowledge.

4th : Moreover, it should be observed that there is nothing inconsistent between the merchant claim and the citizenship claim, and the various statements made on each of these occasions. In order to create a conflict, the Government Brief (p. 7) suggests that the admission in the Chin Ying case that defendant was " a Chinese person and not a member of the exempt classes," while " consistent with the native-born claim " is " inconsistent with the claims alleged to have been made by this defendant in 1897 and 1899 that he was a merchant ". This is an error, arising out of a misconstruction of the term " exempt classes." This was simply an admission that defendant was not a

member of the diplomatic or official class, made "exempt" from the provisions of the Act by Section 13 of the Act of July 5th, 1884, where that very term "exempt" is used. The admission means, and was intended to mean, nothing more. Merchants were regarded under the statute as "privileged to enter," not as "exempt." The Commissioner's Judgment of Deportation (p. 12) shows clearly that this was the meaning of this stipulation, for the Commissioner expressly recites the fact of Chin Ying's "not being a diplomatic or other officer of the Chinese or any other Government." In view of the provisions of Rev. St. 4062–4, making it a crime to issue process against diplomatic officers, this was a reasonable concession, made for the Commissioner's and Government's protection.

II.

(a) The Government's Brief apparently, though vaguely, suggests in several passages that this Court is confined to treaty (and constitutional) questions on the appeals in the Chin Bak Kan and Chin Ying cases, because the appeals were taken direct to this Court from the Circuit Court of Appeals, under Sec. 5 of the C. C. A. Act (Brief pp. 8, 10). It is, of course, well settled that on such appeals, the whole case is open for consideration here, and not merely treaty (and constitutional) questions.

Horner vs. U. S., 143 U. S. 570, 576.
Chappel vs. U. S., 160 U. S. 499, 509
Scott vs. Donald, 165 U. S. 58, 71.
Holder vs. Aultman, 169 U. S. 81, 88.

(b) Nor are these two cases, cases where review is limited to questions cognizable on *habeas*, as suggested by the Government (pp. 9, 10); appeals were here sued out, not writs of *habeas corpus* and the very distinction suggested in the cases relied upon by the Government, applies. All the questions open for review on an appeal, as distinguished from a writ of error, are open here, though in fact, nearly all the questions raised go to the Commissioner's jurisdiction, and of course are open here (Great Southern Co. vs. Jones, 177 U. S. 449, 453).

(c) Nor is the citation of the Fong Yue Ting case on the point that supposed "formal objections merit no attention" (Government Brief, p. 9) relevant: *(a)* because the Chin Bak Kan and Chin Ying cases are appeals, not *habeas* cases *(b)* because the objections under the later statute, in any event, are not formal but jurisdictional *(c)* because other and later statutes than were involved in the Fong Yue Ting case make a sworn complaint jurisdictional.

(d) Moreover, even on *Habeas*, as suggested in one of our principal brief (Chin Bak Kan Brief, p. 27) on an issue like that of citizenship, going to the jurisdiction of the Commissioner, even the facts are reviewable, due allowance being made for certain advantages of judging as to credibility possessed by the trial judge, where the facts are conflicting.

(e) The claim made by the Government in its Brief on the Motion to Vacate bail that a *Habeas Corpus*, even to review the jurisdictional questions raised by the Certificate in the Lee Yen Tai case, (pp. 7, 9-10) is unauthorized, seems to be abandoned in its Brief on

the merits. The claim is obviously untenable that *Habeas* is unauthorized to attack jurisdiction in Chinese Exclusion cases (*In re* Li Sing, 86 F. R. 896, Li Sing vs. U. S. 180 U. S. 486, U. S. vs. Jung Ah Lung, 124 U. S. 621, Wong Wing vs. U. S. 163 U. S. 228, Fong Yue Ting vs. U. S. 149 U. S. 698). Also that an order of imprisonment, null for want of jurisdiction in the district where made, by some miraculous process, becomes valid when the prisoner without his consent is carried into another district (Carter vs. McClaughry, 183 U. S. 365, *Ex. p.* Young, 50 F. R. 526, *Ex. p.* Farley, 40 F. R. 66, 68, U. S. vs. Rogers, 23 F. R. 658, 662, *Ex. p.* Clarke, 100 U. S. 399, *In re* Farrell, 51 F. R. 213).

III.

The Treaty Negotiations Reviewed.

The Government's Brief considers at considerable length, the negotiations leading up to the treaty of 1894, including partially unpublished correspondence, but they do not change the situation, nor in the slightest degree militate against the view that the treaty was intended to meliorate the statutes. Significant is the concession made that the unratified treaty of 1888 is substantially the same as the treaty of 1894 (Government Brief, p. 37, also p. 26). This is in line with the expressed intention of both parties in 1893-4 to go back to the treaty of 1888 as a basis of negotiation (Government Brief, pp. 30, 31, 32), with the registration provisions of our statutes, subse-

quently adopted, tacked on, after the conclusion of the negotiation in 1893–4 as to the elimination or continuance of the latter. The suggestive fact is, that notwithstanding the passage of the Act of 1892 with its oppressive burden of proof and other provisions applicable to Chinese immigration, as well as registration, both parties consented, in 1894, to go back to the adjustment of 1888, which concededly was in the form of a self-executing modification and melioration of our statutes in some respects.

What was gained or lost in the negotiations of 1888 was immaterial, those matters were settled then, and remained as then adjusted. Naturally in 1893–4 there was no occasion to discuss those provisions and their meaning anew. The intention of the parties and the meaning attached to these provisions when drafted, in 1888, is therefore of the greatest significance. The correspondence in 1893–4 deals almost wholly with the question of the retention or elimination of the registration provisions; the other questions were determined when the draft of 1888 was accepted. Ultimately, as shown by the Government, China was compelled to acquiesce in the retention of the registration provisions, and hence Article V of the Treaty was drafted, dealing with these provisions.

Before further considering the correspondence of 1888, however, it should not be overlooked that the Treaty of 1894 was entered into as shown by the Government citations, at the instance of China (p. 27), whose Minister expressly suggested (Nov. 8, 1893):

> "In view of all the facts I would respectfully inquire whether it is now the intention of the United States to permit those serious questions to rest as a finality upon the legislation of Con-

> gress as it now exists, or whether the thought is entertained of further negotiation through a different source, to the end that all the existing difficulties between such nations may be permanently settled, and their honor, dignity and friendship maintained and preserved. If the Government of the United States desires to entertain and consider any negotiation whatever that may lead to an adjustment of the questions involved, I will willingly join in an interview upon that subject."

It should be observed that, in the Government Brief, where this passage is quoted, passages from this letter, immediately preceding this passage, in which China protested against clauses in these acts, are omitted, as indicated by the asterisks. In fact, from 1882 on, China constantly protested against our statutory provisions as violations of treaty, as shown by our "Foreign Relations." But a treaty adjustment, in place of the objectionable subsisting statutes, was now sought, as shown clearly by this letter of November 8, 1893.

The adoption of the unratified treaty of 1888 as a basis of negotiation by each side followed. Secretary Gresham joined in China's request for the negotiation of a new treaty as a substitute for the statute, by writing in January, 1894 (Gov. Brief, p. 31):

> "Earnestly desiring to strengthen the friendship which has so long existed between the United States and China and to promote the highest good of the people of both countries, I am ready to continue negotiations with you for a convention on the basis of the draft treaty of 1888."

China thus requested, and our Government conceded, concessions by treaty, to take the place of the statutory

enactments of our country. The Government's Brief shows clearly that the desire of China to have the registration provisions eliminated was not acquiesced in, but in other respects, the agreement reached in 1888 was adopted by both states, notwithstanding the intermediate passage of the burden of proof provision (Sec. 3 of the Act of 1892), which China specifically protested against. (Senate Executive Documents 52nd Congress, 2nd Session Document No. 54.)

The Government's contributions to the Treaty Correspondence in 1893–4 fail to shake any of the following propositions, based upon the Correspondence of 1888, and referred to in our brief in the Lee Yan Tai case :

(1) The changes in the draft of 1888, in Article III. (preserved in the treaty of 1894), substituted permissive language for mandatory terms as to the certificate for non-laborers, because the certificate was not designed any longer to be the sole permissible mode of proving that applicant was not a laborer. The Treaty Correspondence and changes in the Drafts, quoted in our Lee Yen Tai Brief (pp. 32, 30–1, 39–40) show such intent clearly.

(2) The other clauses of the treaty bear this out, Article I. being the only one using words of absolute exclusion, and that only as to laborers, Article II. having been amended by the Senate after the Jung Ah Lung decision, by adding the last sentence, found in the treaty of 1894, making the laborer's return certificate mandatory and exclusive, and the permissive language of Article III., without such change, being preserved, thus authorizing the admission of non-

laborers, even without production of the treaty certificate.

(3) The Treaty Negotiations of 1888 show unmistakably that China objected to judicial hearings in these cases after entry (Lee Yen Tai Brief, p. 32). Nothing indicating a change of intention in this respect by either parties, in the course of the subsequent treaty negotiations, is pointed out.

4th But China's motive, in desiring a new treaty in 1888, was obviously to meliorate the law. Counsel for the Government errs, when he says in his brief (p. 37): "The return privilege of registered laborers was the striking feature of both treaties" (1888 and 1894). This was not the case with regard to the Treaty of 1888 when signed in that year. Aside from the verbal inaccuracy as to "registration"—which was not made general even as to laborers till 1892—it should be observed that the draft treaty of 1888 did not materially change the prior law, in providing for entry by certain returning-laborers (See text, Gov. Brief, p. 70). The Acts of 1882 and 1884 authorized the *return* of laborers, and it was only after the treaty of 1888 was rejected, that their return was absolutely prohibited, by the Act of October 1st, 1888. The fact is that the Treaty of 1888 was invited by China, for the benefit of her subjects, and it was intended and understood by both sides to meliorate the law. This is clearly expressed by U. S. Minister Denby, in reporting to our Government the substance of an interview he had with the Chinese Yamen, Sept. 17, 1888, in which he sought to secure China's ratification of this Treaty before the President

signed the Act of Oct. 1, 1888. Mr. Denby said (Foreign Relations, 1888, Vol. I. p. 351):

> "China and not the United States had proposed the new treaty. That the sole object of the treaty of 1880 was to exclude Chinese laborers. That the treaty of 1888 changed the word 'suspend' to the word 'prohibit' and limited the effect of the treaty to 20 years. That this constituted the only difference between the treaties (1880 and 1888), *except so far as the latter favored China in other clauses.*"

(b) Some slight inaccuracies in the Government Brief as to the Treaty Negotiations may further be referred to.

(1) Some novel grounds are now suggested (p. 23-5) by the Government for China's failure to ratify the treaty of 1888; the true grounds were mentioned in the President's memorandum of approval of the Act of October 1st, 1888 (Foreign Relations, I. 356-9), and the Communications between China and the United States of that period in the point (*Id.*, 352, 354, 403). They were that China wanted the law limited to 10 years instead of 20 years, and objected to the Senate Amendment (*Id.*, p. 312) by which Article I. was expressly made applicable to Chinese laborers who had already left the United States, and could not therefore secure the certificate obtainable only before leaving this country. The former of these demands was conceded in the treaty ratified in 1894.

(2) These facts also incidentally throw doubts on the correctness of the Government's irrelevant contention (p. 26) that "This correspondence shows that the Chinese authorities, and not the Government of the

United States, were responsible for the failure of the treaty of 1888."

(3) The reference in the Government Brief to the letter from the Chinese Minister to Secretary Gresham (p. 28) antedates the *ratification* of the Treaty of 1894; of course, at that time, the Acts of 1892 and 1893 were regarded as in force. Moreover, as our Executive Department denied China's construction of the Treaty of 1894, representations to our Government that entry of particular persons was authorized, even on the basis of our Government's construction, were naturally in order.

(4) The recitals China desired to have inserted in the Treaty of 1894 (Gov. Brief, pp. 74, 30, 32) as to annulments of all acts of or subsequent to 1888, were of course necessarily eliminated (Gov. Brief, p. 30) when China yielded to our demands that the registration provisions should stand. It was the recital of the rejected demand for the annulment of the registration provisions that our Government objected to, and there would have been such a recital if the language of the draft had been retained as to "the annulment by the Government of the former (U. S.) of all the legislative measures enacted in and since the year 1888, affecting the coming of Chinese subjects into the territory of the United State and their residence therein" (p 74).

(5) The Government's claim (p. 55) that a recital in the first draft of the treaty of 1888, submitted by China, was an assent to the continuance of our statute, is clearly erroneous, as appears from an examination of the draft (p. 78). It shows that the "acquiescence to the recent legislation of the United States aforesaid" refers specifically only to the "law providing for the registration of such Chinese."

IV.

Some Government Criticisms Considered.

1st It should be observed that the Li Sing case (180 U. S.) did not involve any consideration of the treaty of 1894 nor of citizenship claims, nor were any of the points here raised suggested even in the remotest manner in the Gue Lim (176 U. S) case. No case in any way considered the treaty, of those cited in the Government Brief, as holding treaty and statutes to be consistent with each other (p. 20), except that in U. S. vs. Yong Yew, 83 Fed. Rep. 832, the treaty is in part quoted, without consideration thereof.

2nd, The Government's Brief (pp. 46–7) proceeds upon a misapprehension of our purpose in citing in our Lee Yen Tai Brief (p. 2) the case of Mrs. Gue Lim. We referred to that case (176 U. S. 459–467) for the passage quoted at length on p. 26 of the same brief, showing that the certificate for the privileged classes was prescribed, even in the Act of 1884, merely to distinguish them from laborers, not to exclude non-laborers. Under the statute of 1884 and the treaty of 1880 such non-laborer arriving without a certificate, was conclusively presumed, as a matter of law, to be a laborer, for the Treaty of 1880, which the Acts of 1882 and 1884 were intended to execute, authorized only the exclusion of laborers. As we claim that the Treaty of 1894 has made this certificate merely optional, (see Lee Yen Tai Brief pp. 36–41), one not producing the statutory certificate cannot, we claim, any longer be regarded *ipso facto* as a laborer. This question is of great importance in these cases, even independently of the

claim that the Treaty has repealed the procedure section for the deportation through judicial proceedings even of laborers. In all three cases the complaints charged defendants with having entered without the certificate prescribed by law. If non-laborers need no longer produce a certificate, these complaints state no cause of action, but proceed upon the erroneous conclusion of law that a non-laborer entering without the certificate is still conclusively presumed to be a laborer. In the Chin Bak Kan and Chin Ying cases the evidence is all in the records, and shows that there is not a particle of evidence to justify the Commissioner's holding that these defendants are in fact laborers. His holding is obviously based solely upon this erroneous conclusion of law, and should be reversed, if only on this ground. In the Lee Yen Tai case, the specific averments in the petition for the *habeas* as to defendant's mercantile status, are not met by any evidence or denial, and are not negatived by the judgment of deportation, reciting this erroneous conclusion of law upon the charges of the complaint. The averments of the petition therefore stand admitted. This is the rule of practice in habeas cases established by this Court (Whitten vs. Tomlinson, 160 U. S. 231, 242). The jurisdiction of the Commissioner to order deportation of a merchant entering without the merchant's certificate is therefore the precise question in that case, raised by the facts set forth in the Certificate, and possibly the question certified calls for no answer except as to jurisdiction over merchants not producing any certificate.

3rd We are charged with making "statements that are doubtless unintentional errors" (pp. 49–50) in cit-

ing Treasury Decisions of Feb. 7, 1899 and April 14, 1899 as holding that commissioners have *no* jurisdiction in non-registration cases, not being U. S. Judges. Counsel for the Government's characterization is based upon his statement that "I (he) am unable to find these decisions or any other rulings of the Treasury Department holding to that effect." Counsel's inference is, of course, a *non-sequitur*. Rulings to the effect stated were published by the Treasury Department in its compilation of Treasury Laws and Decisions entitled "Digest of Chinese Exclusion Laws and Decisions," 1899, p. 46, disapproving of the California decision to the contrary referred to by us and quoted in the Government Brief (p. 17). The same ruling against the Commissioner's jurisdiction, appears to have been made in the Treasury Department's "Synopsis of Rulings and Decisions," published already in 1896, p. 13.

The case of *in re* Wong Fock 81 Fed. Rep. 558, cited on this point by the Government, is the very case referred to in our Lee Yen Tai brief (p. 15) as the one which Judge LACOMBE refused to follow in March, 1898, though called to his attention by the Government in the case of U. S. vs. Sing Kin San, when he ruled orally that a U. S. Commissioner is not a U. S. Judge within the meaning of Section 6 of the Acts of 1892 and 1893. Judge LACOMBE according ruled that he himself would have to try that case under Section 6, and that the Commissioner had no jurisdiction; this is within the personal knowledge of counsel. This is in line with the many decisions of this Court on the point, cited in our Lee Yen Tai Brief (p. 15), including the Fong Yue Ting decision (at p. 728) on the precise point. The Government con-

tention (Brief p. 16) that there is a collocation of the words "justice, judge and commissioner" in the Act of 1892 which should be supplied in section 6 also, runs directly counter to the principle of law "*expressio unius.*" In the earlier sections of this act—referring only to unlawful entry cases, (Fong Yue Ting case pp. 725–6)—these three terms are used, because they were found also in the earlier procedure section (Sec 12 of the Act of 1884) which Section 1 of the Act of 1892 continued in force. But in the newly-created non-registration procedure, only "United States Judges" were designated by Section 6, obviously because Commissioners were not intended to be authorized to act by a statute itself so clearly making and noting the distinction between these offices. As held in the Fong You Ting case (p. 728) :

> "The designation of the judge, in general terms as 'United States judge," is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of habeas corpus or warrants to arrest persons accused of crime" (Rev. St., 752, 1014).

We do not understand the Government to claim that U. S. Commissioners can issue writs of habeas corpus, nor that the extraordinary contention was sustained in any court that a U. S. Commissioner is a United States judge, except in the case in 81 Fed. Rep., 558, cited by the Government.

In the Government's Brief on the Bail Motions (pp. 17–18) it was intimated that these orders by Commissioners in the unlawful entry cases under consideration

might be sustained, as if made under Section 6 of the Acts of 1892 and 1893 by a U. S. Judge for non-registration, in order to invoke an alleged statutory prohibition of bail. This claim we sought to refute on various grounds (Lee Yen Tai Brief, pp. 15, 16). The Government now apparently acquiesces in our view that here these sections are irrelevant, at least for the reason that "these men are not proceeded against strictly as non-registered laborers" (p. 18). We discussed the matter at some length for the further reason that we desired to make it clear that Article V. of the Treaty continues in force only these severable and distinct registration provisions, and not the sections here involved, and because the question is directly involved in other appeals taken to this Court.

The Government's new suggestion (Brief, p. 18), that after the Commissioner had acted, a U. S. Judge had made an order of deportation, sustainable under the non-registration provision, is erroneous: (*a*) because the cases came up on appeal only, as unlawful entry cases, under Section 13 of the Act of Sept. 13, 1888, and the facts and requirements under section 6 were not under consideration; (*b*) because on the appeal, the case was before the District Court, not before the judge having jurisdiction under Section 6 (Fong Yue Ting case, 149 U. S., 698, 728; U. S. vs. Gee Lee, 50 F. R., 271). (*c*) Because concededly these men were not laborers within the United States in 1892 and 1893, who alone were required to register (See our Lee Yen Tai Brief, p. 15.)

4th. It should be observed that the Quock Ting case (140 U. S., 417), cited by the Government, on the facts as to citizenship, is distinguishable, because there the

applicant, *in habeas corpus proceedings*, showed such lack of knowledge of San Francisco affairs as this Court deemed inconsistent with his claim that he had lived there during the first ten years of his lifetime, especially in connection with his suspiciously detailed knowledge of the supposed facts as to his leaving, and that the interested evidence of the father, who remained here for years after shipping his family to China, was devoid of any corroborative circumstance, and no one else, less interested, was examined in the city of the alleged residence of father and son.

5th The Government also relies on the case of

In re Louie You, 97 Feb. Rep. 580

quoted in the Government Brief (p. 14). It is following a case like this, that is responsible on the facts for the decisions rendered below. We challenge the correctness of this decision, in which without even statutory authority evidence is disregarded, which is not discredited or improbable, but simply avowedly because it is Chinese evidence. See decision to the contrary on this point, concurred in by Mr. Justice McKenna 100 F. R. 398 (C C A) On the citizenship issue, such discrimination is, we contend, unconstitutional. From the nature of the thing, corroboration by white witnesses is practically impossible upon such issues. Congress has established no such rule of evidence, and it is submitted that such a law would be unconstitutional (Wong Kim Ark Case, 169 U. S. 649 Fong Yue Ting Case 149 U. S. 698, 742). It is like throwing the burden of proof on a citizen in cases affecting his most sacred rights, and at the same time forbidding him to introduce any evidence to meet such burden. Such rulings would deprive thousands of unfortunate

American citizens of Chinese extraction of their constitutional rights. Tha correct rule of law applicable, directly contrary to the case relied upon by the Goverment, is laid down in the cases of U. S. vs. Yee Mun Sang, 93 F. R. 365, and U. S. vs. Jue Wy, 103 F. R. 795. The language used in the Yee Mun Sang case, *supra* is a correct exposition of the law, in a similar case, involving the same circumstances:

> "The testimony as to his place of birth is not preposterous or unnatural, and cannot justly be rejected, although it cannot be contradicted, if not true. It must be weighed as lawful evidence in any case must be. When so weighed, it appears to prove the fact."

V.

Appellants' Claims to Citizenship are not Inherently Unreasonable or Improbable and Required Different Treatment than Accorded below.

The Government's Brief and oral argument referred to the alleged improbability of these claims to citizenship, presented by persons of the Chinese race, returning to the United States, after absence from infancy on. It is submitted that there is nothing inherently improbable or unreasonable in such claims.

Some facts which the Court will take judicial notice of, are here material. In 1860, there were 34,933 Chinese persons in the United States; in 1870 there were 63,199 (49,000 in California); in 1880 there were 105,465 (75,132 in California); (Compendium of

the Tenth Census of the United States, I., p. 334). The Census of 1890 shows that there were then 106,000, which number had fallen to 93,000 in 1900, according to the U. S. Census of that year. That many of the Chinese inhabitants of California during the decade between 1870 and 1880 were women, is testified to in the Chin Bakkan case by a Government witness (Record, p. 13). Of course, many children were born to them, particularly in California, who under the Wong Kim Ark case are citizens of the United States. The Government has, moreover, published a table of figures (Senate Executive Document No. 54, of the 52nd Congress, 2nd Session), prepared by the Collector of Customs at San Francisco, showing that at that port alone, 32,090 more Chinese persons had departed from the United States from 1882 to 1891 than had arrived. The Act of Oct. 1, 1888, prohibiting the return of Chinese laborers, even though they had left the United States with papers authorizing return, deprived thousands of laborers of their privilege of re-entry. As the law was made more stringent as to merchants, thousands of these also were unable to secure the necessary consents from executive and consular officers to permit them to return. Moreover, for many years, minors were excluded because, until this Court decided the Gue Lim case (176 U. S., 459), they could not secure the inappropriate certificates, and were erroneously treated as forbidden to enter without them. The figures above quoted indicate beyond question also how common it was for Chinese residents of the United States, whether for business, family or sentimental reasons, to re-visit China with their children from time to time, with the intention of returning. When right of the parents to return was cut off, the education of their

children, American citizen though they were, had to take place till they reached man's estate, in China, where the parents per force had to reside. Under such circumstances, is it strange or improbable that Chinese minors, born in the United States, who left with their parents, should after years return to this land of promise, and be looked out for by their uncles or other relatives, when they arrive here? It is submitted that there is nothing unreasonable or improbable in this claim. Of course, when even some courts reject uncontradicted evidence of this kind, simply because it is Chinese, on the plea of its alleged inherent improbability, executive officers in the course of their "star-chamber" proceedings, may be relied upon to do so almost invariably, and from the point of view of such executive officers, every one who enters is "smuggled" in, and enters unlawfully. Hence, in large measure, arises the idea of extensive unlawful entries. The loose general allegations of the Government of "fraud" and "inherent improbability" in this class of cases, will not bear scrutiny.

(b) That applicants for admission, claiming to be citizens, need not before entry submit their claims to citizenship, to executive officers for consideration, because such officers would have no jurisdiction over them, is sustained, not merely by the decision of Judge WHEELER, quoted in our Chin Bak Kan and Chin Ying brief (p. 19), but by a line of unbroken decisions, in the lower federal courts, rendered both before and since the Act of August 1894, construed by this Court in the Lem Moon Sing case (158 U. S., 538)

In re Look Tin Sing 21 F. R. 905 (FIELD, J.).

In re Yung Sing Hee 36 F. R. 436.
Ex. p. Chin King 35 F. R. 354.
In re Tom Yum 64 F. R. 484 (Under Act of 1894).
Gee Fook Sing vs. U. S. 49 F. R. 146 (C C A).
In re Di Simone 108 F. R. 942.

Accordingly such persons need not make their application in the first instance to customs officers, having no jurisdiction over them, and wait either outside of the country or in confinement during the weeks or months during which such executive officers are conducting their *ex parte* examination of the case, and run the risk of being prejudiced in subsequent judicial proceedings by an unfavorable ruling by such executive officer, based on incompetent, undisclosed and perhaps non-existing evidence. Their neglect to do so, does not indicate fraud in any way.

(c) If there be fraud occasionally in such cases, as the Government contends, the Government can, through greater vigilance, exclude such persons, and require them to secure, as a means of testing *right of entry*, a writ of *habeas corpus*, or institute legal proceedings in accord with the "law of the land" and bills of rights for the determination of such questions as to persons who have entered and are actually enjoying the benefits of citizenship, and also, in appropriate cases, resort to the criminal laws prescribing penalties for unlawfully bringing in excluded persons, either Sections 2, 8, 11 and 16 of the Act of 1884 (23 Stat., 115), or substitutes therefor.

In fact, it is difficult to see why existing special statutes and judicial remedies do not meet the very

contingencies under consideration. Sec. 5428 of the Revised Statutes of the United States provides:

> "Every person who falsely represents himself to be a citizen of the United States, without having been duly admitted to citizenship, for any fraudulent purpose whatever, shall be punishable by a fine of not more than one thousand dollars, or be imprisoned not more than two years, or both.

It addition, it would seem that civil proceedings will also lie at the instance of the Government to test such claim to citizenship, by proceedings in the nature of *quo warranto* or the like (Territory of Nebraska vs. Lockwood, 3 Wallace, 236; Rex vs. Richmond, 6 T. R., 560; Reg. vs. Ireland, 9 B. & S., 19). These are the remedies the law affords for dealing with such claims to citizenship, and not the Chinese Exclusion Law procedure.

VI.

The Government's Claim that the Act of Sept. 13, 1888, providing for return of laborers went into effect and continued in force, and that Article II. of the Treaty was therefore not new legislation, is untenable.

This claim seems to be made as to Secs. 5 and 6 of the Act of Sept. 13, 1888. But, just as in the case of Section 12, of that Act, considered and held not to have gone into effect in the Li Sing case (180 U S 486) the Act of October 1st, 1888 is subsequent, and superseded the earlier provision, even if it could be

regarded as having been in force for any purpose. The treaty of 1894 therefore made in this respect, too, radical changes in the then-existing law, as it had been construed after the Act of Oct. 1, 1888 by this Court in the Chae Chan Ping case (130 U. S.).

VII.

The suggestion made by the Government that treaties should not be construed as superseding inconsistent prior statutes as to personal rights, as distinguished from property, is untenable.

If we have correctly apprehended this Government proposition as above formulated, we submit that it is not only novel and without support in authority, but clearly untenable. The Constitution makes treaties as well as statutes the supreme law of the land (Article VI.), and this is tantamount to contending that treaties cannot make provision with respect to personal rights. While this Court has indicated that there may be some limitations on the treaty-making power (Geofroy vs. Riggs, 133 U. S., 258, 267), they have no relation to this case, and there are no such limitations as contended for. In fact, these very treaties with China have been recognized by this Court as conferring personal rights on aliens (Yick Wo vs. Hopkins, 118 U. S., 356, 368-9; U. S. vs. Wong Kim Ark, 169 U. S., 649, 702).

(b) Moreover, the case of Geofroy vs. Riggs and the later cases in this Court, decided subsequent to Ware

vs. Hylton, all recognize that the intent to effect a repeal by treaty of a prior statute can more lightly be inferred than the converse case, because the treaty involves the additional element of international faith, in addition to mere legislation, and in construing a statute claimed to be inconsistent with a treaty, the canon of construction must be applied of finding unmistakably expressed legislative intent to violate treaty faith. Nor, either on principle or authority can the proposition be sustained, it is submitted, that a treaty is to be regarded as a general law, in its relations to prior special laws (Gov. Brief, p. 40). In its nature it has no such character. In fact, if such principle were to be applied, in view of the relations of treaties to State legislation as well as federal, it would seem to follow that definite references to every conceivable phase of voluminous State and federal law would be necessary, in order to supersede such "special" legislation, and that the foreign contracting sovereign is to be charged with knowledge of the law of every State, in all its details.

(c) The case of Geofroy vs Riggs is furthermore direct authority for the view that implications of treaties, as well as unmistakable, express terms, supersede inconsistent prior statutes.

VIII.

In conclusion, may we be permitted diffidently to submit to the Court, considerations with respect to the hardship that would result if the motions in these

cases as to the right to bail should not be decided, because possibly no longer of necessary practical moment in these very cases? Last December, on applying to Judge COXE for orders for bail in connection with the allowance of appeals to this Court, granted by him in several Chinese Exclusion cases involving also other questions than those here involved, that Judge suggested, in view of the doubtful question involved, that an application to this Court as to the bail orders should be made instead, the U. S. Attorney advised the Court that he had recommended that the Government raise the question by moving in this Court to vacate the orders for bail herein and Judge COXE accordingly directed the applications, for bail before him to stand over. Some of the men concerned have been in jail *for over a year*. After some time, the motions to vacate orders herein were made by the Government, and both sides joined in an earnest prayer to this Court for a determination of that question. In view of this situation, applications direct to the Court for bail in these other cases have not been made. In the interim, in other jurisdictions, Judge WHEELER and Judge ADAMS have, to counsel's knowledge, permitted bail on appeals from their orders, but the unfortunates in the Northern District of New York remain in close confinement.

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